STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

SOUDABEH JANSSENS, Appellant, and IOWA DEPARTMENT OF CULTURAL AFFAIRS, Appellee.	)	CASE NO. 90-MA-04

RULING ON MOTION TO DISMISS

On March 1, 1990, Appellee Iowa Department of Cultural Affairs [State] filed a motion to dismiss the Appellant's state employee grievance and disciplinary action appeal filed September 29, 1989, as amended on February 9, 1990.

In her appeal, as amended, Appellant Soudabeh Janssens [Janssens] invokes the jurisdiction conferred upon the Public Employment Relations Board [PERB] by §§19A.14(1) and (2), and, as to her §19A.14(1) claim, alleges the State's violation of §79.2, Code of Iowa (1989), and various administrative rules of the Iowa Department of Personnel [IDOP], specifically 581 Ia. Admin. Code 5.2(6), 11.2, 11.3, 14.3(12) and 20.3(1). Appellant further alleges that she is unsatisfied with the IDOP Director's third step grievance decision because it failed to remedy what she characterizes as a "discriminatory and illegal discharge for the sole reason of disability without reasonable inquiry as to feasible accommodations".

The State's motion is based upon two separate grounds: That Janssens has failed to state a claim upon which relief can be

granted, and that PERB is without subject matter jurisdiction over at least some portions of her appeal.

PERB's jurisdiction over state employee grievance and disciplinary action appeals flows, in part, from §19A.14, Code of Iowa (1989). That section provides:

> 1. *Grievances.* An employee, except an employee covered by a collective bargaining agreement which provides otherwise, who has exhausted the available agency steps in the uniform grievance procedure provided for in the department of personnel rules may, within seven calendar days following the date a decision was received or should have been received at the second step of the grievance procedure, file the grievance at the third step with the director. The director shall respond within thirty calendar days following receipt of the third step grievance.
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> If not satisfied, the employee may, within thirty calendar days following the director's response, file an appeal with the public employment relations board. The hearing shall be conducted in accordance with the rules of public employment relations board and the Iowa administrative procedure Act. Decisions rendered shall be based upon a standard of substantial compliance with this chapter and the rules of the department of personnel. Decisions by the public employment relations board constitute final agency action.
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> For purposes of this subsection, "*uniform grievance procedure*" does not include procedures for discipline and discharge.
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> 2. *Discipline resolution.* A merit system employee, except an employee covered by a collective bargaining agreement, who is discharged, suspended, demoted, or otherwise reduced in pay, except during the employee's probationary period, may bypass steps one and two of the grievance procedure and appeal the disciplinary action to the director within seven calendar days following the effective date of the action. The director shall respond within thirty calendar days following receipt of the appeal.

> If not satisfied, the employee may, within thirty calendar days following the director's response, file an appeal with the public employment relations board. The employee has a right to a hearing closed to the public, unless a public hearing is requested by the employee. The hearing shall otherwise be conducted in accordance with the rules of the public employment relations board and the Iowa administrative procedure Act. If the public employment relations board finds that the action taken by the appointing authority was for political, religious, racial, national origin, sex, age, or other reasons not constituting just cause, the employee may be reinstated without loss of pay or benefits for the elapsed period, or the public employment relations board may provide other appropriate remedies. Decisions by the public employment relations board constitute final agency action.

PERB thus exercises jurisdiction over two types of employee appeals: Those brought under §19A.14(1) which contest grievance decisions, in which the employee must allege a violation of chapter 19A or IDOP rule, and those brought under §19A.14(2) which challenge disciplinary actions, in which no statutory or rule violation need be alleged.[1]

I. FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

A motion to dismiss for failure to state a claim serves the function of a demurrer which, together with other technical forms of pleading, has been abolished in the Iowa courts.[2] In ruling on such a motion, the allegations of the pleading under attack are taken as true, and any ambiguity or uncertainty in the pleading is

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[1]See PERB rule 11.3(1)(10), 621 Ia. Admin. Code 11.3(1)(10).

[2]Herbst v. Treinen, 249 Iowa 695, 88 N.W.2d 820 (1958).

resolved in favor of the party resisting the motion.[3] Thus, the motion admits the facts alleged in the pleading under attack, and asserts that there is no right to relief from those admitted facts. In the courts, a motion to dismiss for failure to state a claim must be filed before the answer. Motions filed subsequent to answering are untimely.[4]

In the present case, the State filed its answer on November 2, 1989, denying the substantive allegations of the Appellant. In the ensuing period of over four months the matter has been scheduled for hearing on the merits, a pre-hearing conference conducted, subpoenas issued and a continuance to the hearing's presently-scheduled date granted in order to afford the parties time for additional discovery (an opportunity both parties have utilized). Both parties, through their counsel, have availed themselves of formal procedural and discovery devices typically employed by counsel representing parties before the district courts.

PERB's rules contain no provisions concerning the time for the filing of motions such as the one now pending. However, I can perceive no reason for PERB to adopt a totally unrestrictive procedure concerning motions which would allow parties represented by counsel who are engaged in substantial discovery and motion practice to completely, even if only temporarily, change the focus

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[3]Hoefer v. Sioux City Comm. School Dist., 375 N.W.2d 222 (Iowa 1985).

[4]See, e.g., Ia.R.Civ.P. 104(b), Riediger v. Marrland Development Corp., 253 N.W.2d 915 (Iowa 1977); Powell v. Khodari-Intergreen Co., 303 N.W.2d 171 (Iowa 1981).

of a pending dispute by filing and litigating motions which would clearly be untimely in the district courts. The issues have been joined and it is inappropriate that the Appellee, without seeking to withdraw its answer and the denials contained therein, should now be allowed to attack the sufficiency of a pleading it had full opportunity to scrutinize before answering. Consequently, I conclude that Ia.R.Civ.P. 104(b) should apply to §19A.14 appeals, and that the division of Appellee's motion premised upon an alleged failure to state a claim should consequently be denied.

Even were I to ignore the untimeliness of this portion of Appellee's motion and address its merits, denial would be appropriate.

In considering a motion for failure to state a claim, the pleading under attack is examined to determine whether it appears to a certainty that the pleader has failed to state a claim on which relief may be granted under any state of facts which could be proved in support of the claims asserted in the pleading.[5]

The division of Appellee's motion asserting a failure to state a claim focuses on only two of the allegations of the Appellant: That the Appellee violated IDOP rules 11.2 and 11.3. The State correctly points out that rule 11.2 concerns disciplinary actions and sets out the types of discipline which may be imposed and the types of conduct which may result in discipline, while rule 11.3 deals with procedures an agency must follow in accomplishing a

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[5]See, e.g., Turner v. Thorp Credit, Inc., 228 N.W.2d 85 (Iowa 1975).

reduction in its work force. The State apparently argues that although rules 11.2 and 11.3 are "rules of the department of personnel" within the meaning of §19A.14(1), Janssens' allegation that she suffered a "discriminatory and illegal discharge for the sole reason of disability..." is inconsistent with an allegation of a violation of those rules, since they deal with employee discipline and work force reduction, and not discrimination or disability. Appellee thus apparently views Janssens' allegation of a "discriminatory and illegal discharge" as a limitation on the other allegations contained in her appeal, rather than as a supplement thereto.

The State's apparent argument overlooks the principle that any ambiguity or uncertainty in the pleadings is to be resolved in favor of the party resisting dismissal, and the fact that Janssens has alternatively alleged that this proceeding is an appeal of a disciplinary action brought pursuant to §19A.14(2), an allegation which necessarily conveys with it a claim that the discipline was without just cause, in support of which no allegation of statutory or rule violation need be made.

Appellant's filing thus clearly conveys, at a minimum, a claim that she suffers from a disciplinary action imposed without just cause. This allegation alone is sufficient to avoid dismissal on the basis that she has failed to state a claim on which relief could be granted under some state of facts which could be proved at hearing.

Of course, whether the record will ultimately establish that Janssens' discharge was disciplinary in nature or not remains to be seen. If it is determined that no disciplinary action took place, Janssens' success or failure will hinge upon her remaining §19A.14(1) claim and her ability to establish a violation of one of the rules itemized in her pleading.

Although Janssens' allegation of a violation of IDOP rule 11.2 as an apparent part of her §19A.14(1) claim is surplusage, in view of the fact that that rule deals with discipline, a subject area covered by her alternative §19A.14(2) allegation, I cannot conclude that it will be impossible for Appellant, under any set of facts, to establish that her termination was a reduction in force within the meaning of rule 11.3 and that Appellee violated that rule in connection with her termination. Nor can I conclude, to a certainty, that if Janssens were able to establish a violation of any of the other rules she has alleged have been violated, such a showing would not, as a matter of law, entitle her to relief. Consequently, I would deny Division I of the State's motion, on its merits, even were I to conclude that its post-answer filing did not require denial on timeliness grounds.

II. LACK OF SUBJECT MATTER JURISDICTION.

In Division II of its motion the State questions the existence of subject matter jurisdiction in PERB to adjudicate claims advanced by the Appellant.[6] I conclude that although this division

[6]Although not clearly articulated, the claimed lack of subject matter jurisdiction is apparently addressed only to Janssens' §19A.14(1) claim.

of Appellee's motion must also be denied, PERB is without subject matter jurisdiction over one of Janssens' claims not challenged by the State, and that that portion of her appeal must be dismissed.

Subject matter jurisdiction refers to the power of a tribunal to hear and determine the class of cases to which a particular case belongs. Administrative agencies possess no common law or inherent powers, but only those powers specifically conferred by statute or necessarily implied therefrom.[7] Thus, to determine whether PERB has subject matter jurisdiction to hear and adjudicate a particular case, its statutory grant of authority must be examined.

The Public Employment Relations Act, chapter 20, Code of Iowa, is the major source of PERB's authority. Section 20.1(3) specifically provides that PERB's powers and duties include: "[a]djudicating...state merit system grievances...." Additionally, §19A.14, quoted above, clearly and unambiguously empowers PERB to conduct hearings on appeal from the IDOP Director's decisions in both grievance [§19A.14(1)] and disciplinary action [§19A.14(2)] cases. Section 19A.14(1) provides that decisions of PERB in grievance appeal cases "shall be based upon a standard of substantial compliance with this chapter [19A] and the rules of the department of personnel."

Section 19A.14(1), in conjunction with §20.1(3), thus confers subject matter jurisdiction upon PERB to adjudicate only those

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[7]See, e.g., Quaker Oats Co. v. Cedar Rapids Human Rts. Comm'n., 268 N.W.2d 862 (Iowa 1978); Iowa Dept. Social Services v. Blair, 294 N.W.2d 567 (Iowa 1980).

state employee grievance appeals based upon alleged violations of chapter 19A or IDOP rules -- nothing more and nothing less.

The State argues that at least one of the rules alleged to have been violated[8] was adopted in order to implement chapter 19B, Code of Iowa. Although apparently acknowledging that that rule is a "rule of the department of personnel" within the meaning of §19A.14(1), Appellee insists that PERB's jurisdiction does not extend to grievance appeals alleging violations of all IDOP rules, but instead only extends to appeals alleging violations of chapter 19A or IDOP rules implementing chapter 19A. Appellee would thus read the §19A.14(1) language "[d]ecisions rendered shall be based upon a standard of substantial compliance with this chapter and the rules of the department of personnel" as meaning "this chapter and the rules of the department of personnel implementing this chapter." Like another administrative law judge who has confronted this argument by the State[9], I decline to so limit the statutory language enacted by the general assembly.

If statutory language, given its plain and rational meaning, is precise and free from ambiguity, no more is necessary than to apply to the words used their natural and ordinary sense in connection with the subject considered, and a tribunal is not permitted to write into the statute words which are not there.[10]

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[8]Specifically, IDOP rule 20.3(1).

[9]See Devine and Iowa Dept. Natural Resources, 89-MA-08 (Ruling on Motion to Dismiss issued June 27, 1989).

[10]Dingman v. City of Council Bluffs, 249 Iowa 1121, 90 N.W.2d 742 (1958).

I perceive the language of §19A.14(1) concerning "the rules of the department of personnel" to be precise and free from ambiguity, and thus decline to add, under the guise of interpretation, the limitation that such rules must be only those implementing chapter 19A. Had the general assembly desired such a limitation it could have easily added the language the Appellee would insert by implication. It did not. I believe the statute must be read with reference to the language the legislature in fact employed, not that which it could, or perhaps should have used.

Consequently, I conclude that PERB possesses subject matter jurisdiction over not only Appellant's §19A.14(2) claim, but also over her alternative §19A.14(1) claim which alleges violation of IDOP rules 5.2(6), 11.2, 11.3, 14.3(12) and 20.3(1). PERB has been granted authority by the legislature to adjudicate precisely these classes of cases, and Appellant's allegation that her appeal is brought under both §19A.14(2) and §19A.14(1), coupled with her allegation that certain IDOP rules have been violated, are sufficient for a finding that jurisdiction over the case's subject matter exists.

The same conclusion, however, cannot be reached with regard to Janssens' allegation, in support of her §19A.14(1) claim, that the State has violated §79.2, Code of Iowa (1989).

A tribunal has a duty, on its own motion, to refuse to decide controversies not properly before it, and has the power to determine whether it has jurisdiction of a controversy regardless

of the parties' waiver or consent.[11] Since decisions of PERB issued pursuant to §19A.14(1) are to be based upon a standard of substantial compliance with chapter 19A and IDOP rules, it is apparent that the legislature did not intend that PERB adjudicate state employee claims that the employer violated statutory provisions outside chapter 19A, or rules of an agency other than IDOP. Since §79.2, alleged to have been violated by the Appellant, is not a provision contained in chapter 19A, I conclude that PERB is without subject matter jurisdiction to entertain that portion of her claim, and that the §79.2 allegation must be dismissed on my own motion in view of Appellee's failure to raise the matter.

This is not to suggest that the substance of the prohibition contained in §79.2, if also contained in an IDOP rule or a provision of chapter 19A, could not form the basis for an employee grievance appeal over which PERB would have jurisdiction. Should such a provision exist in either chapter 19A or the IDOP rules, a §19A.14(1) appeal alleging a violation of such would be within PERB's jurisdiction. However, PERB cannot exercise jurisdiction over state employee grievance appeals based upon an alleged violation of §79.2, for a finding that such section had been violated would not alone establish a lack of substantial compliance with chapter 19A or IDOP rules -- the standard the general assembly has required PERB to apply in §19A.14(1) grievance appeals.

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[11]Campbell v. Iowa Beer & Liquor Control Dept., 366 N.W.2d 574 (Iowa 1985).

IT IS THEREFORE ORDERED that the Department of Cultural Affairs' motion to dismiss the instant appeal for failure to state a claim upon which relief can be granted be and is hereby DENIED.

IT IS FURTHER ORDERED that the Department of Cultural Affairs' motion to dismiss the instant appeal for lack of subject matter jurisdiction in PERB be and is hereby DENIED.

IT IS FURTHER ORDERED that that portion of the instant appeal which relies upon an alleged violation of §79.2, Code of Iowa (1989), be and is hereby dismissed, PERB lacking subject matter jurisdiction over state employee grievance appeals alleging violation of statutes other than those contained in chapter 19A.

DATED this 30th day of March, 1990.

PUBLIC EMPLOYMENT RELATIONS BOARD

JAN V. BERRY
ADMINISTRATIVE LAW JUDGE

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